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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

FLOWONIX MEDICAL INCORPORATED, Plaintiff, v. PAUL HANCHIN, DON DONNELLY, SCOTT HOLSTINE and JULIE LONGOBARDI, Defendants.	Civil Action No. 2:16-2570 **Document Electronically Filed**

MEMORANDUM OF LAW OF PLAINTIFF FLOWONIX MEDICAL INCORPORATED IN SUPPORT OF ITS APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE WHY A PRELIMINARY INJUNCTION SHOULD NOT ISSUE

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I. PRELIMINARY STATEMENT

Approximately three weeks ago, Paul Hanchin, Flowonix's Executive Vice President (and the most senior officer of the Company, except for the CEO and CFO) responsible for, among other things, global sales and marketing operations, voluntarily resigned his employment. Hanchin refused for almost two weeks (the notice period) to identify his new employer. During this time, and without the knowledge of Flowonix, Hanchin emailed to his personal email account troves of highly confidential information and trade secrets (including, for example, Flowonix's 2016 operations strategy, new product initiatives, costs of goods and revenue projections, and analyses of competing products, e.g., implantable medical devices that treat chronic pain). Only then – on the 13th day of the 14-day notice period – did Hanchin reveal that he had accepted an offer to become the President of Nuvectra Corporation – a competitor of Flowonix, engaged in a substantially similar business, *i.e.*, an implantable medical device used to treat chronic pain. In fact, Nuvectra's product received FDA approval less than six months ago and the Flowonix confidential information spirited away by Hanchin will give Nuvectra a quick leg up in the marketplace.

Unfortunately, Hanchin's violation of the non-competition provision of his employment agreement and theft of trade secrets is only the tip of the iceberg. Hanchin has launched an aggressive plan (perhaps in the works for weeks prior) to

recruit critical sales staff from Flowonix to Nuvectra in order to lure away Flowonix's clients. On Sunday, May 1, 2016, and Monday, May 2, Flowonix's entire sales management team (*i.e.*, three Regional Sales Directors: Defendants Donnelly, Holstine, and Longobardi) resigned, effective immediately and without notice, for undoubtedly similar positions with Nuvectra. What's more, Flowonix has learned that Donnelly and Holstine began contacting their Flowonix direct reports – sales representatives – even before they resigned, making misrepresentations about Flowonix, in an effort lay the groundwork for hiring Flowonix sales representatives at Nuvectra. Indeed, one sales representative (in Donnelly's territory) has already resigned.

After Hanchin finally revealed that he planned to compete as President of a competitor – but before Flowonix discovered his misappropriation of trade secrets – Flowonix wrote to Hanchin (copying Nuvectra) to advise of the non-compete breach and to seek immediate confirmation that he had not and would not breach his confidentiality or non-solicitation restrictions. Through Nuvectra's attorney, Hanchin assured Flowonix that he had not taken any of Flowonix's confidential information and was not in breach of the non-solicitation provision. When Flowonix learned of Hanchin's misappropriation it again wrote to Hanchin and Nuvectra placing them on notice of potential litigation and demanded that Nuvectra immediately investigate and requested additional assurances.

On Friday, April 29th, outside counsel for Hanchin admitted that Hanchin secreted away information and documents, but claimed Hanchin did not realize anything was wrong with sending to his personal email account the highly confidential information. Hanchin's attorney also represents Nuvectra and stated that Hanchin did not provide the information to Nuvectra. Two days later, Hanchin executed his scheme to steal away Flowonix's entire sales management team. Flowonix also sent Donnelly, Holstine, and Longobardi letters advising them that their new employment breached their respective employment agreements and requesting that cease and desist. Nuvectra's and Hanchin's counsel responded on behalf of Donnelly, Holstine, and Longobardi and stated that those defendants would not cease breaching their contractual obligations. According to their counsel's letter, Defendants contend that Nuvectra is not in a substantially similar business to Flowonix. That Flowonix's *entire* sales management team now constitutes the entire (or nearly the entire) sales management team *at Nuvectra*, and that Hanchin, Nuvectra's President, misappropriated a trove of confidential information on the eve of his last day of employment at Flowonix, puts the lie to Defendants' contention. The Food & Drug Administration, Nuvectra, and QiG Group, LLC, an affiliate of Nuvectra's predecessor company, Greatbatch, Inc., publicly have described the products of Flowonix and Nuvectra as competing in the same field of neuromodulation, competing to treat patients in the same stage of

chronic pain management, and as alternatives to each other in the treatment of chronic pain. (Verified Compl., ¶¶ 22-24 & n.2.) In short, Defendants' conduct (contractual breaches and misappropriation) and the admissions of Nuvectra and QiG (and the FDA's consistent statements) prove that – at a *minimum* – the Defendants are engaged *at Nuvectra* in business substantially similar to the business of Flowonix.

Flowonix now moves this Court to enforce the rights and obligations that the Defendants have violated, continue to violate, and, from all accounts, have laid the groundwork to violate again and again. In less than a months' time, Nuvectra – with Hanchin at the controls – now employs Flowonix's entire sales management team. Hanchin and the directors whom he solicited are all bound by Confidentiality, Assignment of Inventions and Non-Competition Agreements prohibiting them from working for Nuvectra for two years following their resignations from Flowonix. They are also each prohibited from soliciting Flowonix's employees and customers and are obligated to protect and not use or disclose Flowonix's confidential and proprietary information and trade secrets. All of them have broken their promises and, unless immediately enjoined, will continue to do so by working for Nuvectra and expanding their solicitation efforts to Flowonix's sales representatives (whom they had managed) – indeed, those efforts are believed to have already begun.

Accordingly, Flowonix is likely to prevail on the merits of its claims for breach of contract because Defendants' ongoing employment and actions on behalf of Nuvectra violate the clear terms of their non-compete, non-solicitation and confidentiality covenants. Hanchin, Nuvectra's President, has been caught red-handed misappropriating Flowonix's highly confidential information and trade secrets. Moreover, his willful and malicious disregard of his obligations (and encouraging the other Defendants to breach their Agreements) further indicates that Hanchin (and likely the other Defendants) will inevitably use and disclose Flowonix's confidential and proprietary information. Second, in the absence of an injunction, Flowonix will be irreparably harmed through damage to its reputation, the loss of good will, the loss and/or impairment of relationships with customers and employees, the disclosure of trade secrets, disruption and delay to its business plans, and lost future business and market share. Third, a balance of the hardships weighs heavily in favor of Flowonix. Defendants voluntarily left well-paid positions with Flowonix with full knowledge that their employment with Nuvectra would violate their Agreements. Hanchin misappropriated Flowonix's trade secrets and then lied to Flowonix when asked. Hanchin, Donnelly, Holstine, and Longobardi also conspired and executed a raid of the entire sales management team of Flowonix, who resigned, without notice, at the same time, leaving Flowonix's sales team as a boat without a rudder. Finally, the issuance of the

injunction does not contravene any public policy and, in fact, serves the public interest that encourages employers to invest in their employees and businesses, and the public interest in enforcing contractual promises.

For these reasons, Flowonix respectfully requests that the Court grant its Application and issue a Temporary Restraining Order and Order to Show Cause temporarily and preliminarily enjoining Defendants from using or disclosing Flowonix's confidential information and trade secrets and enjoining Defendants from violating the obligations to which they voluntarily agreed.

II. STATEMENT OF FACTS[1]

A. FLOWONIX AND NUVECTRA'S IMPLANTABLE MEDICAL DEVICES COMPETE FOR THE THERAPEUTIC TREATMENT OF CHRONIC PAIN.

Flowonix and Nuvectra are medical device companies that manufacture and sell FDA-approved implantable medical devices for the therapeutic treatment of chronic pain. (Verified Complaint, at ¶¶ 10-14.) Flowonix makes and markets the Prometra Programmable Pump system ("Prometra"). (Id.) Nuvectra makes and markets the Algovita Spinal Cord Stimulation (SCS) System ("Algovita"). (Id.) Prometra and Algovita compete as alternative long-term therapies that doctors may prescribe when treating patients with chronic pain. (Id. at ¶ 23.) Prometra is FDA-approved to treat patients suffering from chronic pain. (Id. at ¶¶ 11, 13.)

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1 Flowonix summarizes certain key facts derived from its Verified Complaint.

Algovita is FDA-approved to treat patients suffering from chronic pain – but was only recently approved in November 2015. (Id. at ¶ 12.) Nuvectra admits that implantable drug pumps, like Prometra, and SCS products, like Algovita, are alternative and competing treatments for chronic pain. (Id. at ¶¶ 22-23.)

Thus, while Flowonix has sold and marketed Prometra to anesthesiologists, neurologists, neurosurgeons and physiatrists in the United States for years, Nuvectra began selling and marketing Algovita in the United States two months ago, when it launched its first commercial offering after it spun off from QiG Group, LLC, an affiliate of corporate parent Greatbatch, Inc. in March 2016. (Id. at ¶¶ 10, 20, 24.) Having taken Flowonix's entire sales management team and troves of confidential documents and trade secrets – as well as more nuts-and-bolts proprietary documents such as policies, procedures and even the template non-compete/non-solicit agreement that is at issue here – it is clear that Defendants intend to recreate at Nuvectra the sales team from Flowonix, and to leverage Flowonix's confidential information, sales and marketing strategies, and customer lists of anesthesiologists, neurologists, neurosurgeons and physiatrists to whom Flowonix sells. (Id. at ¶¶ 19, 21, 26.)

B. HANCHIN'S EMPLOYMENT AND ACCESS TO CONFIDENTIAL INFORMATION

On December 8, 2014, Flowonix hired Hanchin as Executive Vice President of the company. (Id. at ¶ 28.) In consideration for his employment with Flowonix

and in exchange for providing Hanchin with Flowonix's confidential information and trade secrets, Hanchin executed a valid and enforceable Confidentiality, Assignment of Inventions and Non-Competition Agreement (the "Hanchin Agreement") on December 15, 2014. (See id. at ¶ 29 & Ex. A.)

As Executive Vice President, Hanchin reported directly to the CEO and worked directly with the executive team and Board of Directors in both the strategic and operational direction of the Company. (Id. at ¶ 30.) After the CEO, Hanchin was the next most senior executive for Flowonix operations, sales and marketing with direct responsibilities for sales, marketing, customer care, reimbursement and national accounts. (Id. at ¶¶ 30-31.)

C. DEFENDANTS HANCHIN, DONNELLY, HOLSTINE AND LONGOBARDI'S AGREEMENTS.

Until Hanchin solicited them away, Flowonix had three Regional Sales Directors covering its United States market, Don Donnelly, Scott Holstine and Julie Longobardi, who regularly interacted with Flowonix's sales staff and clients within their respective territories. (Id. at ¶ 35.) The Directors covered Flowonix's entire U.S. sales operations. (Id.) Each of the Directors – who all earned six figure base salaries – entered into binding Confidentiality, Assignment of Inventions and Non-Competition Agreements (the "Agreements"). (Id. at ¶¶ 36, 38, 40 & Exs. M, O, Q.) Under the direction and oversight of Hanchin — Donnelly, Holstine and Longobardi were responsible for the marketing and sale of

Flowonix products by cultivating and growing relationships with customers – customers procured and developed at great expense by Flowonix who invested heavily in developing and enhancing the company's goodwill. (Id. at ¶ 42.) Specifically, Hanchin and the Directors were a key component of Flowonix's "public face" keeping in close contact with Flowonix's sales representatives, customers, physicians, and key opinion leaders. (Id. at ¶¶ 42-43.)

D. POST-EMPLOYMENT CONTRACTUAL OBLIGATIONS TO FLOWONIX

In order to prevent the erosion of its business – indeed, in order to preserve its business model – Flowonix requires all of its employees to execute a Confidentiality, Assignment of Inventions and Non-Competition Agreement, which contains provisions for the protection of its business model and confidential information. (Id. at ¶ 45.) Flowonix and Defendants acknowledged that their positions with the company were "one[s] of trust and confidence by reason of [their] access to and contact with confidential information upon which the Company's business and financial success critically depend." (Id. at ¶ 47 & Exs. A, M, O, Q, at ¶ 1(a).) Defendants further agreed that both during the terms of their employment and thereafter, they will "hold all [] Proprietary Information in confidence and will not disclose such Proprietary Information to any person, firm or corporation (except as necessary in carrying out [their] work for the Company, consistent with the Company's policies)." (Id. at ¶ 49.) In the absence of express

written permission – which Flowonix has never provided – Defendants agreed they would never "directly or indirectly use any Proprietary Information for [their] own benefit or for the benefit of another or in any way adverse to the Company business interests" either during the term of their employment or thereafter. (Id. at ¶ 51 (citing Agreements ¶ 1(c)).)

Defendants promised to not compete with Flowonix for "two (2) years after [their] termination of employment with [Flowonix] (the 'Restricted Period')." (Id. at ¶ 53 (citing Agreements ¶ 3).) They that they would not "except as an officer and director of [Flowonix] and its Affiliates , engage at any place within the United States of America or abroad in any business substantially similar to the business applications then being conducted by the Company or its Affiliates (the 'Designated Industry'), whether directly or indirectly, for [their] own account or as an employee, partner, officer, director or consultant." (Id.) The Defendants further acknowledged that Flowonix incurs great expense in conducting its business worldwide and thus "engagement by [Defendants] in the Designated Industry (as hereinafter defined) anywhere in the United States of America or internationally could cause the Company irreparable harm." (Id. at ¶ 52 (citing Agreements ¶ 3.).) Defendants further covenanted to not "(b) divert to any competitor of [Flowonix] or its Affiliates any customer of [Flowonix]or its Affiliates, or (c) solicit or encourage any officer, employee or consultant of [Flowonix] or its Affiliates to

leave its or their employ for alternative employment in the Designated Industry." (Id. at ¶ 54 (citing Agreements ¶ 3).)

Defendants also agreed that immediately upon Flowonix's request or promptly upon termination of employment, they would return: "all memoranda, notes, records, reports, photographs, drawings, plans, papers or other documents or files [they] made or compiled in the course of [their] services to [Flowonix] or which are in [their] possession or under [their] control, and any copies or abstracts thereof." (Id. at ¶ 57 (citing Agreements ¶ 1(d)).) Hanchin and the Directors expressly agreed that all such memoranda or other documents and files are deemed to be property of Flowonix, whether or not of a secret or confidential nature. (Id.)

Flowonix and Defendants acknowledged that any breach of the Agreement would result in Flowonix incurring irreparable harm to its interests, which would entitle Flowonix to immediate injunctive relief in specific performance of the obligations under the Agreements or other appropriate equitable relief and any claims arising from the Agreements would be governed by New Jersey Law. (Id. at ¶¶ 58, 60 (citing Agreements ¶ 5, ¶ 7(b)).)

E. DEFENDANTS' BREACH OF THEIR COVENANTS AND MISAPPROPRIATION OF FLOWONIX TRADE SECRETS AND CONFIDENTIAL.

On March 18, 2016, Hanchin provided Flowonix's CEO and President, Steve Adler, two weeks' notice that he was resigning, but refused to disclose to

Adler that he was leaving for Nuvectra until on March 30, 2016 – his last day of work was March 31. (Id. at ¶¶ 61-62.) On that same day, Hanchin secretly transferred numerous confidential and proprietary Flowonix documents to his personal email account, which included, among other things, Flowonix's operating plans and projections from 2014-16, board of directors presentations regarding the company's sales, competitive analyses and marketing efforts, vendor and product cost information, and information on physician clients, sales targets, and industry opinion leaders Flowonix was potentially targeting for product advice and product marketing purposes. (Id. at ¶¶ 33, 62 & Exs. B-J.)

F. HANCHIN ENGAGES IN A SCHEME TO RAID FLOWONIX SENIOR SALES MANAGEMENT

The timing of Hanchin's departure and subsequent appointment as Nuvectra's president strongly suggests that Nuvectra (or its predecessor company) offered Hanchin the position of President prior to March 18, 2016. By April 5, 2016, Hanchin was President of Nuvectra. Less than one month later, Donnelly, Holstine and Longobardi resigned *en masse*, without notice and effective immediately. (Id. at ¶ 70.) Upon information and belief, Flowonix believes that throughout March 2016 and April 2016, Defendants targeted Flowonix to raid its employees, interfere with its operations in the United States, improperly move business and gain access to Flowonix's confidential and proprietary information, in order to irreparably harm and unfairly compete against Flowonix. (Id. at ¶ 73.)

G. Flowonix's Reasonable Efforts To Avoid Litigation.

Prior to filing this Complaint and the accompanying motion for immediate injunctive relief, Flowonix wrote to each of the Defendants in an attempt to protect its confidential information, enforce its rights and the Defendants' contractual and common law post-employment obligations to Flowonix, and, if possible, avoid litigation. Not yet having discovered Hanchin's misappropriation, on April 4, 2016, Flowonix sent Hanchin a letter, with a copy to Nuvectra's general counsel, explaining its position that Nuvectra was a competitor, reserving its right to enforce the noncompetition provision, and seeking Hanchin's affirmation that he would not violate the confidentiality and non-solicitation provisions. Flowonix further requested that he return any Flowonix property and documents/information in his possession. (Id. at ¶ 63 & Ex. S.) On April 8, 2016, Nuvectra's general counsel responded on behalf of Nuvectra and Hanchin, denying that Nuvectra competes with Flowonix because it does not manufacture or sell an implantable drug pump, denying any wrongdoing by Hanchin, advising that Hanchin "has not retained any confidential information of Flowonix nor will he use or disclose any confidential information" and "the only property of Flowonix that remains in [Hanchin's] possession is a wireless modem and a key card and he will return both … this week." (Id. at ¶ 64 & Ex. T.)

Subsequently, after learning that Hanchin had sent troves of Flowonix confidential materials and trade secrets to his personal email account, counsel for Flowonix wrote to Hanchin and Nuvectra's counsel on April 21, 2016 to advise them of Hanchin's unlawful activity and place them on notice of potential litigation. (Id. at ¶ 65 & Ex. U.) Flowonix demanded that Hanchin (i) identify to Flowonix all emails and other documents copied, downloaded, or otherwise retained or removed from Flowonix, whether electronic or hard copy, and which remain in his possession, custody or control, (ii) immediately return his Flowonix-issued iPad (which he had not returned) in an unaltered state along with any passwords necessary for access, and (iii) provide immediate unambiguous assurances that he is in complete compliance with the confidentiality and non-solicitation obligations set forth in his Agreement. (Id.)

In a separate letter to Nuvectra's general counsel, Flowonix pointed out that Nuvectra's claim that it did not compete with Flowonix was directly at odds with statements Nuvectra makes publicly on its website regarding competing treatment options (Id. at ¶ 66 & Ex. U; see also id. ¶ 23.) Flowonix further demanded that results from any investigation of potentially misappropriated Flowonix information be appropriately quarantined and preserved to allow for forensic analysis to be performed on any electronically stored information. (Id.)

III. ARGUMENT

A temporary restraining order and preliminary injunction should issue where, as here: (1) the plaintiff is likely to succeed on the merits; (2) denying the injunction will result in irreparable harm to the plaintiff; (3) granting the injunction will not result in greater harm to the defendant; and (4) the injunction is in the public interest. Novartis Consumer Health, Inc. v. Johnson & Johnson – Merck Consumer Pharm. Co., 290 F.3d 578, 586 (3d Cir. 2002); Ballas v. Tedesco, 41 F. Supp. 2d 531, 538 (D.N.J. 1999) (applying TRO standard). The moving party bears the burden of persuasion only with respect to the first two elements. Acierno v. New Castle Cty., 40 F.3d 645, 653 (3d Cir. 1994). The third and fourth elements are factors which "the district court should take into account, when they are relevant." Id. at 653.

A. FLOWONIX IS LIKELY TO PREVAIL ON THE MERITS OF ITS CLAIMS AGAINST DEFENDANTS.

1. FLOWONIX IS LIKELY TO SUCCEED ON THE MERITS OF ITS BREACH OF CONTRACT CLAIM AGAINST ALL DEFENDANTS.

The facts and evidence already presented by Flowonix with the Verified Complaint support Flowonix's strong likelihood of success on each of its breach of contract claims against Defendants. The starting point of any contract analysis is the language of the contract and it is a fundamental precept in contract law that parties to a contract are bound by the language they employ in that contract. Chas

S. Wood & Co. v. Kane, 42 N.J. Super. 122, 127 (App. Div. 1956) ("The presumption is that the parties who voluntarily engaged in the agreement regarded the limitational covenants as reasonably necessary. It is assumed that they intended to make a valid contract.") (internal citations omitted)). Where the terms of a contract are clear and unambiguous, there is no room for interpretation or construction and the courts should enforce those terms as written. Levison v. Weintraub, 215 N.J. Super. 273, 276 (App. Div. 1987).[2] Here, the terms are clear, Defendants shall not,

> 1. "[E]ngage at any place within the United States of America or abroad in any business substantially similar to the business applications then being conducted by [Flowonix] or its Affiliates (the 'Designated Industry')"
>
> 2. "[D]ivert to any competitor of [Flowonix] or its Affiliates any customer of [Flowonix]or its Affiliates," or
>
> 3. "[S]olicit or encourage any officer, employee or consultant of [Flowonix] or its Affiliates to leave its or their employ for alternative employment in the Designated Industry."

(Verified Compl. at ¶¶ 53-54 & Exs. A, M, O, Q, at ¶ 3.)

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[2] Defendants' restrictive covenants also are supported by ample consideration. Defendants executed the Agreement as a condition of employment with Flowonix and in exchange for receiving (a) Flowonix's confidential information, and (b) significant remuneration received for their employment. (Verified Compl. ¶¶ 29, 36, 38, 40.)

New Jersey has long enforced restrictive covenants like these that protect the legitimate business interests of the employer.[3] See, e.g., Solari Indus., Inc. v. Malady, 55 N.J. 571 (1970); Hogan v. Bergen Brunswig Corp., 153 N.J. Super. 37 (App. Div. 1977). Further, restrictive covenants with two year durational terms have been found to be reasonable under New Jersey law. Touzot v. ROM Dev. Corp., No. 15-6289, 2016 WL 1688089, at *10 (D.N.J. Apr. 26, 2016) (citing Cmty. Hosp. Group, Inc. v. More, 869 A.2d at 897-98 (two years reasonable); Trico Equip., Inc. v. Manor, No. 08-5561, 2009 WL 1687391, at *7 (D.N.J. June 13, 2009) (two years reasonable)).

i. NUVECTRA ENGAGES IN BUSINESS THAT IS SUBSTANTIALLY SIMILAR TO FLOWONIX.

It is beyond dispute that Defendants' current employment with Nuvectra is in the same "Designated Industry" in which they worked at Flowonix prior to voluntarily terminating their employment. (Verified Compl. at ¶¶ 18-19, 21-23.) Nuvectra informs potential patients that the "third stage" of treating chronic pain is "*[l]ong-term therapy, including implantable drug pumps or spinal cord*

3 The Agreements provide for the application of New Jersey law. (Verified Compl. at ¶ 60 (citing Agreements, at ¶ 7(b) ("The laws of the State of New Jersey shall govern the interpretation, validity and effect of this Agreement without regard to the place of performance thereof.").)

stimulation." (Id. at ¶ 23.) Notably, a Nuvectra predecessor, QiG Group, LLC,[4] acknowledges on its website that implantable drug pumps and spinal cord stimulators are each classified within the "neuromodulation" market that includes the use of "implanted device[s] to modulate and alter neural activity within the body." (Id. at ¶ 24; see also Neuromodulation, QiGGroup.com (last visted May 8, 2016) (emphasis added), available at, http://www.qiggroup.com/neuromodulation .aspx.)

Nuvectra makes Algovita, an implantable spinal cord stimulation device, and Flowonix makes Prometra, an implantable programmable drug pump. (Verified Compl., at ¶¶ 11-12.) Algovita and Prometra both deliver treatments (electrical stimulation for Algovita, medication for Prometra) to the spinal cord and are alternative options that physicians can prescribe to patients suffering from chronic pain. (Id. at ¶¶ 13-17.) At a minimum, Nuvectra's market for Algovita (neuromodular treatment of chronic pain through electrical stimulation delivered to the spine) is a "substantially similar" business application to Flowonix's market for Prometra (neuromodular treatment of chronic pain through medication delivered to the spine) because both involve the use of an implanted medical device that modulates neural activity in the spinal cord.

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4 See Verified Compl., at ¶¶ 10, 24; see also Press Release, Greatbatch, Inc. Files Form 10 for its Proposed Nuvectra Spin-Off, NuvectraMedical.com (July 30, 2015), available at, http://nuvectramedical.com/.

Prometra and Algovita are also marketed to the same customers. Flowonix markets Prometra to anesthesiologists, neurologists, neurosurgeons and physiatrists who treat patients for chronic pain. (Id. at ¶ 18.) Accordingly, it comes as no surprise that Nuvectra's sales team markets the Algovita system specifically to anesthesiologists, neurologists, neurosurgeons and physiatrists who treat patients for chronic pain. (Id. at ¶ 19.) In fact, Algovita only received FDA approval in November 2015 and was the first commercial offering by Nuvectra since its spin-off from former parent, Greatbatch, Inc. (Id. at ¶¶ 10, 12.) Hanchin's employment agreement with Nuvectra no doubt includes lucrative incentives for reaching sales and revenue milestones, providing more than enough motivation for him to breach his restrictive covenants and misappropriate trade secrets. Moreover, considering Nuvectra's recent entry into the market in March 2016, Nuvectra ventured to gain an extreme competitive advantage by hiring Hanchin and the other Defendants – obtaining overnight the intimate knowledge of national sales strategies, customer relationships and other valuable business information Flowonix invested in greatly for Prometra.

These facts leave no question that Flowonix and Nuvectra are engaged in a substantially similar competitive space. Prometra and Algovita (i) treat the same condition, chronic pain, (ii) through a similar under the skin, implantable delivery

system, and (iii) are marketed to the same medical practitioners who treat patients with this condition.

Under similar factual circumstances, courts have enforced non-competes regardless of any procedural differences between respective treatments or targeted population segments. For example, in Urologix, Inc. v. Wood, No. 08-669, 2008 WL 2790230 (M.D. Fla. July 18, 2008), the plaintiff, Urologix, marketed a product that used microwave technology to treat benign prostatic hyperplasia (BPH), or enlarged prostate. The defendants, former Urologix employees, established a business that used radio frequency therapy and laser surgery to treat BPH (in addition to microwave therapies). Urologix did not use radio frequency technology or perform surgery. In response to Urologix's action to enforce a non-compete agreement, the former employees argued that the radio frequency therapy and the laser surgery were not competitive products because they were "different treatment options that depend on the medical status of the patient." Id. at *5. The court rejected this argument, holding that "[t]hese types of treatments, although procedurally different, represent products, processes or services that are of the same general type, that perform similar functions, compete with, are used for the same purposes or are intended for the same application as Urologix products, processes and services as stated in the definition of 'Competitive Product' contained in the Employment Agreements." Id.

Similarly, in Lombard Med. Techs., Inc. v. Johannessen, 729 F. Supp. 2d 432 (D. Mass. 2010), the defendants, former employees of Lombard, argued that they were not in breach of their non-competes because their new employer's product, a stent graph, was targeted at different patients and functioned in very different ways than Lombard's stent. In upholding the non-competes, the court held that "[w]hile the products may target slightly different segments of the population, there is considerable overlap," and that both products were meant to treat the same disease, abdominal aortic aneurisms. The stents were therefore sufficiently similar to each other to be encompassed by the non-compete.

As in Urologix and Lombard — and as stated on Nuvectra's own website — the Flowonix Prometra pump and Nuvectra's spinal cord stimulator perform similar functions, are used for the same purposes, and are intended for the same applications. Compare About Prometra, Flowonix.com (last visited May 4, 2016) ("Prometra may be able to help relieve your chronic pain symptoms"), with About SCS, NuvectraMedical.com (last visited May 4, 2016) ("Spinal cord stimulation, or SCS, is a therapy that has been helping people manage their chronic pain for more than 40 years.").

In an effort to escape the reality that its products compete in the neuromodulation market, Flowonix anticipates Defendants may dive deep into the minutiae arguing that they cannot be substantially similar because Prometra

delivers a drug treatment, while Algovita delivers electrical treatment. However, this argument belies that prohibited competition can occur where products "perform similar functions, . . . used for the same purposes or are intended for the same application." See Urologix, Inc., 2008 WL 2790230, at *5 (finding a non-compete enforceable where both products treated BPH, notwithstanding procedural difference that one used radio wave therapy versus microwave therapy). The neuromodulation market includes any *implanted device* that *modulates and alters neural activity within the body*. As admitted by Nuvectra's own predecessor, "*[t]hese devices are currently classified as stimulators or drug pumps*." (Verified Compl. at ¶ 24 (emphasis added) (quoting Neuromodulation, QiGGroup.com (last visited May 8, 2016).)

Plaintiff also anticipates that Defendants will point to the differing FDA-approved indications and contraindications to allege no competitive overlap exists between Flowonix's and Nuvectra's products. Any such efforts are similarly unavailing because the FDA approvals have nothing whatsoever to do with the products' competitive applications – doctors will prescribe one or the other to treat chronic pain. See Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 350 (2001) ("Similarly, 'off-label' usage of medical devices (use of a device for some other purpose than that for which it has been approved by the FDA) is an accepted and necessary corollary of the FDA's mission to regulate in this area without

directly interfering with the practice of medicine."); cf. Bailey v. Wyeth, Inc., 37 A.3d 549, 558 (Ch. Div. 2008), aff'd sub nom. DeBoard v. Wyeth, Inc., 28 A.3d 1245 (App. Div. 2011) ("The FDA's job and legal mandate is not to regulate the practice of medicine but simply to regulate the availability of medications to the practicing population at large."). As noted by the Buckman and Bailey courts, the public policy underlying the FDA approval process was not intended to regulate physician discretion in practice of medicine, let alone matters of unfair competition. But, as noted in the Complaint, the FDA has described Algovita and drug pumps as "alternative" treatments for chronic pain. (Verified Compl., at ¶ 22 n.2.) Accordingly, Defendants attempt at preempting their legally valid restrictive covenants with Flowonix on such grounds must fail.

2. BY ACCEPTING EMPLOYMENT AT NUVECTRA, DEFENDANTS BREACHED THEIR NON-COMPETE.

There is no dispute that Defendants now work for Nuvectra. As explained above, Nuvectra engages in business that is substantially similar to Flowonix and thus, meets the Agreements' definition of Designated Industry. As a result, Flowonix is likely to prevail on its contractual non-compete claims against Defendants.

3. THE DEFENDANTS ARE LIKELY TO BE FOUND IN BREACH OF THEIR NON-SOLICITATION COVENANTS.

It is similarly well-established that the protection of customer relations is a core employer interest that is worthy of protection by the courts. Bio-Imaging Techs., Inc. v. Marchant, 584 F. Supp. 2d 322, 327 (D. Mass. 2008)("New Jersey recognizes proprietary and confidential information and customer relationships as legitimate interests protectable through restrictive covenants."); A.T. Hudson & Co., Inc. v. Donovan, 216 N.J. Super. 426, 433 (App. Div. 1987) (an employer "does have a legitimate interest in protecting his customer relationships"); Platinum Mgmt. Inc. v. Dahms, 285 N.J. Super. 274, 297 (Law. Div. 1995) ("the relationships [plaintiff] had with its customers are clearly protectable under the law"); Mailman, Ross, Toyes & Shapire v. Edelson, 183 N.J. Super. 434,440 (Ch. Div. 1982) ("An employer's ongoing professional relationship with its clients is recognized as a legitimate business interest which may be protected through a restrictive covenant.").

Flowonix plainly has legally protectable interests in the investments the company made in Defendants towards developing relationships with Flowonix's sales representatives – and in turn, the relationships with the physicians that Flowonix marketed its products to – all of which significantly impacts the very business model Flowonix operates under. Flowonix cannot successfully remain in

business if Defendants' are allowed to immediately solicit their former subordinates to work at Nuvectra selling substantially similar treatments for chronic pain to the same physicians that Flowonix sells its competing product to. See Nat'l Repographics, Inc. v. Strom, 621 F. Supp. 2d 204, 226 (D.N.J. 2009) ("The restrictive covenant contained in NRI's employment contract was designed to protect … its relationship with customers, which are legitimately protectable interests."").

Without the benefit of discovery, Flowonix has already uncovered strong evidence that Defendants already have breached, and will continue to breach, their non-solicitation covenants by attempting to raid Flowonix's sales force and clients. Hanchin, Nuvectra's newly appointed President, has already breached his contractual duty to not solicit Flowonix's employees by virtue of soliciting Donnelly, Holstine and Longobardi—Flowonix's entire sales management team—to resign *en masse* for employment at Nuvectra. Further, Donnelly and Holstine began contacting their subordinate sales representatives prior to resigning and making misrepresentations about Flowonix, suggesting the sales representatives should leave Flowonix's employ and laying the groundwork for bringing Flowonix's sales force with them to Nuvectra.

Beyond the unlawful poaching of Flowonix employees in violation of their restrictive covenants, Hanchin and the three Regional Sales Directors actions will

leverage the goodwill that Flowonix has established with customers and key opinion leaders for their own benefit and in violation of the employment agreements. Armed with Flowonix's goodwill and confidential information, the Defendants also will have an unfair advantage in targeting Flowonix's customers and competing in the market in general.

Such actions by Defendants run contrary to the very essence of what Flowonix's non-solicitation provision is meant to protect—the valuable relationship the company invested in developing between its sales employees and its clientele. The unlawful conduct Flowonix has uncovered to-date supports the likelihood it will prevail on its contractual non-solicitation claims against Defendants.

4. THE DEFENDANTS ARE LIKELY TO BE FOUND IN BREACH OF THEIR DUTY TO NOT DISCLOSE OR USE FLOWONIX'S CONFIDENTIAL INFORMATION.

Defendants will further violate their Agreements because they cannot perform their duties as sales executives for Nuvectra without using and disclosing confidential and proprietary information they learned while selling Flowonix's substantially similar product used in treatment of chronic pain. Hanchin already has been caught red-handed misappropriating Flowonix's trade secrets.

Moreover, the confidentiality provision agreed to by Defendants is reasonably tailored to protect Flowonix's legitimate business interests. New Jersey

recognizes that the protection of an employer's confidences is a legitimate interest worthy of protection by enforcement of restrictive covenants. Lamorte Burns & Co., Inc. v. Walters, 167 N.J. 285, 301 (2001) (holding that "specific information provided to [employees] by their employer, in the course of employment, and for the sole purpose of servicing plaintiff's customers, is legally protectable as confidential and proprietary information."). Notably, the information need not rise to the level of a trade secret to be protectable. Bio-Imaging Techns., Inc., 584 F. Supp. 2d at 328 (applying New Jersey law) (citing Platinum Mgmt. Inc. v. Dahms, 285 N.J. Super. 274, 297 (Law. Div. 1995)).

Thus, the types of protectable information subject to contractual confidentiality clauses encompass a wide variety of knowledge and documents that a company maintains in confidence in furtherance of its business pursuits, including, but not limited to, customer information, lists and research, market and competitive analyses, product marketing strategies, pricing and cost structures, sales and revenue projections, budgetary documents, employee information, sensitive information discussed during company meetings, or operational plans. Bio-Imaging Technologies, Inc., 584 F. Supp. 2d at 328 (enforcing one-year non-competition agreement because "much of the information Marchant had access to, such as the 'S.W.O.T.' analyses, could be of significant value to a competitor"); Campbell Soup Co. v. Desatnick, 58 F. Supp. 2d 477, 490 (D.N.J. 1999) (employer

had legitimate protectable interest in restrictive covenants where "[d]uring the last six months of his employment with Campbell, Desatnick attended a number of meetings at which highly sensitive and confidential business information was discussed"); Platinum Mgmt., 285 N.J. Super. at 295-96 (defendant's knowledge of plaintiff's "customers' buying habits, [plaintiff's] mark-up structure, merchandising plans, sales projections and product strategies" all were "protectable through a restrictive covenant.").

As alleged in detail in the Verified Complaint and confirmed by the emails attached thereto, it is indisputable that Hanchin possesses Flowonix's confidential information and trade secrets that he only had access to because he served as Flowonix's Executive Vice President. The documentary evidence Flowonix submitted to the Court proves Hanchin systematically compiled and transmitted this information to himself a day before his departure from Flowonix (and Plaintiff's investigation is continuing). Hanchin received much of this confidential information at or in preparation for meetings with Flowonix's Board of Directors or his fellow C-Suite executives. Considering both the breadth and timing of the information taken, Hanchin's conduct can have no other purpose than for Defendants' illegitimate use and disclosure in their attempt to reconstitute Flowonix's national sales operations at Nuvectra.

Accordingly, Flowonix is likely to prevail on its contractual claim for alleged breach confidentiality against Defendants.

5. FLOWONIX IS LIKELY TO SUCCEED ON ITS TRADE SECRET MISAPPROPRIATION CLAIM AGAINST HANCHIN.

Misappropriation claims are governed by the New Jersey Trade Secrets Act ("NJTSA"). A violation of the NJTSA can occur in one of two ways: through (1) "[a]cquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means" or (2) "[d]isclosure or use of a trade secret of another without express or implied consent of the trade secret owner by a person who . . . used improper means to acquire knowledge of the trade secret." N.J.S.A. 56:15-2. Included in the NJTSA's definition of "improper means" is "access that is unauthorized or exceeds the scope of authorization." Id. The NJTSA defines "trade secret," in relevant part, as any information that:

> (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
>
> (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Id. Further, the NJTSA permits injunctive relief where misappropriation is "[a]ctual or threatened." N.J.S.A. 56:15-3(a). "A trade secret may consist of a

formula, process, device or compilation which one uses in business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." Sun Dial Corp. v. Rideout, 16 N.J. 252, 257 (1954).

There is no question that Hanchin's substantial post-resignation transfer of highly confidential Flowonix documents was knowingly improper, if not illegal. It also cannot be questioned that Flowonix took ample precautions to maintain the confidentiality of the files stolen by Hanchin. Flowonix requires all of its employees to sign such confidentiality agreements in consideration for their employment, and secures documents such as those taken by Hanchin through password protected access to its networks. Obviously, Hanchin decided to make a run on such valuable business information on March 30, knowing his access would soon be revoked.

Moreover, under the well-known and accepted doctrine of inevitable disclosure, a court may grant injunctive relief in the face of an imminent threat if the employee will inevitably disclose confidential information to a competitor; the court need not wait until the harm already has occurred. See Nat'l Starch & Chem. Corp. v. Parker Chem. Corp., 219 N.J. Super. 158, 162 (App. Div. 1987) (enjoining employee from working in envelope adhesive areas even though such work comprised very small portion of new duties because new employer was trying to create similar formula); E.R. Squibb & Sons, Inc. v. Hollister, Inc., No.

91-203, 1991 WL 15296 (D.N.J. Feb. 5, 1991) (noting that if a plaintiff can demonstrate sufficient evidence establishing an imminent threat of the disclosure of trade secrets, a court should not hesitate to enter an injunction).

This is not a case where an employer argues only that its departing employee had access to highly confidential information and that, merely by going to work for a competitor, the former employee inevitably will use confidential information to which he has been exposed. Rather, this is a case in which a former senior company executive systematically, willfully and actually stole Flowonix's trade secrets after announcing his intention to resign and just before announcing a similar high level position as an executive officer with Nuvectra (though he initially would not disclose it). Indeed, the manner in which Hanchin accessed and downloaded information makes it quite clear that he was acting with the intent to disclose and/or use Flowonix's trade secrets without it ever having known – indeed, there is no other plausible explanation.

Flowonix has more than a reasonable likelihood of establishing that Hanchin violated the NJTSA. As established above, Hanchin was not authorized to copy Flowonix's proprietary and confidential business information documents to his personal email account. Thus, when he sent those files to personal email address on the eve of his departure from Flowonix, he did so through "improper means," as defined by the NJTSA because he would have no legitimate need for the breadth

and volume of confidential information he took, and in the April 29th letter he admitted that he did not email himself the information for Flowonix's benefit; instead, Hanchin implausibly contended that he believed it was OK to do so, as if Flowonix would not mind that Hanchin removed sensitive, highly confidential information – including still-current 2016 plans and strategies – and then assume the position of President at a competitor. Notably, Hanchin concealed the identity of his new employer for almost the entire two-week notice period. Among the files Hanchin downloaded without authorization were a variety of Flowonix's operation, marketing, and sales data that would be of immense value to Flowonix competitors in the chronic pain management industry, such as Nuvectra, including Flowonix account details, account volumes, account conversion trends, ASP trends and spread, explant rates, allocation and productivity of salesforce and marketing resources. (Verified Compl., at ¶ 32; see also id. at ¶¶ 31-33(a) – (i) & Exs. B-J.)

These files clearly were not available to Hanchin or Nuvectra through any other means but Hanchin's improper emails. Indeed, that this information was of value to companies in the Designated Industry, such as Nuvectra, is evidenced by Flowonix's efforts to protect it from public disclosure – and Hanchin's efforts to take them. Only employees were permitted to access this information and even they were required to enter confidentiality agreements before such access was granted. Such information constitutes trade secretes under the NJTSA. See NVR,

Inc. v. Davern, No. 15-5059, 2015 WL 9450831, at *2 (D.N.J. Dec. 23, 2015) ("list of 40 land deals and obtained a substantial amount of confidential information including documents related to pricing strategy and the design of land purchase agreements" constitutes trade secrets).

B. DENIAL OF THE REQUESTED RELIEF WILL RESULT IN IRREPARABLE HARM TO FLOWONIX.

If Defendants are permitted to breach their Agreements and perform services for Nuvectra and misappropriate the trade secrets in their possession, Flowonix will be irreparably harmed. To satisfy the irreparable injury standard, a party seeking a preliminary injunction need only show the potential of a harm which cannot be redressed by a remedy following trial. Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801 (3d Cir. 1989). "Grounds for irreparable injury include loss of control of reputation, loss of trade, and loss of goodwill." Pappan Enters., Inc. v. Hardee's Food Sys., Inc., 143 F.3d 800, 805 (3d Cir. 1998). As noted, Defendants possesses a wide variety of confidential and proprietary information, including business strategies for the marketing and sale of products competitive with Flowonix's proprietary chronic pain treatment products.

Further, Defendants will be selling Nuvectra's competing chronic pain treatment product at the same facilities, trade shows and to the same physicians as their former Flowonix co-workers, who are also subject to the same limited restrictive covenants. Flowonix would be irreparably harmed if Defendants were

allowed to breach their Agreements and then flaunt that breach before similarly-bound Flowonix employees.

Simply put, Defendants are misappropriating Flowonix's goodwill, depriving Flowonix of the opportunity develop its sales force, to further its business relationships with its physician customers, and allowing a competitor of Flowonix to ingratiate itself with its clients by exploiting Flowonix's goodwill and the training and confidential information Flowonix provides to its employees. For these reasons, courts have consistently recognized the irreparable harm an employer faces when a trusted employee with confidential and proprietary information is permitted to immediately join a competitor. See, e.g., Nat'l Repographics, Inc., 621 F. Supp. 2d at 229 (finding irreparable harm due to "FLMR's stature as a direct competitor and Strom's significant involvement and participation in NRI's strategic business decisions, as well as his knowledge of NRI's strategies for its New Jersey branches"); Bio-Imaging Technologies, Inc., 584 F. Supp. 2d at 330 ("By offering services that compete with Bio-Imaging, Marchant will likely cause Bio-Imaging to lose customers and business. . . . It would be nearly impossible for Bio-Imaging to quantify the exact amount of lost business attributable to Marchant and thus injunctive relief is appropriate."); Manhattan Assocs., Inc. v. Ruderman, No. 05-3928, 2005 WL 2290297, *19 (D.N.J. Sept. 20, 2005) (enjoining a former employee from working for a direct

competitor, holding that the former employer may not only lose business, but suffer a dilution of good will and loss of trade; applying New York law); Novartis Consumer Health, Inc., 290 F.3d at 596 (noting that in a competitive industry, loss of market share constitutes irreparable harm).

C. THE BALANCE OF HARDSHIPS WEIGHS HEAVILY IN FAVOR OF FLOWONIX.

A balancing of hardships weighs heavily in favor of Flowonix. First, "a court should be hesitant to find undue hardship on the employee" when the employee voluntarily left the employment and, in effect, brought the hardship upon himself. Karlin v. Weinberg, 77 N.J. 408, 424 (1978); Scholastic Funding Group, LLC, No. 07-557, 2007 WL 1231795, at *31 (D.N.J. Apr. 24, 2007) (balance of harms favored former employer where "[i]t is undisputed that [the employee] left Plaintiff's employ on his own accord"). Here, Defendants voluntarily left well-paying positions with Flowonix to engage in a substantially similar business. Although there is hardship on every individual by the enforcement of a restrictive covenant, that alone cannot preclude the enforcement of the Agreements or such agreements would never be enforced. Bio-Imaging Technologies, Inc., 584 F. Supp. 2d at 330 (defendant "has voluntarily chosen to leave Bio-Imaging after freely entering into a non-compete agreement"); Manhattan Assocs, 2005 WL 2290297, at *20.

Moreover, Defendants are not precluded from earning a living. They can work for any other employer, so long they do not engage in the "Designated Industry" during the next two years selling substantially similar products that compete with the products they sold while employed by Flowonix. Nat'l Repographics, Inc., 621 F. Supp. 2d at 229; Bio-Imaging Techs., Inc., 584 F. Supp. 2d at 330.

D. The Public Interest Is Served By Granting The Injunction.

Granting Flowonix's request for a limited preliminary injunction does not interfere with the public interest and, in fact, serves the public interest. Enforcement of reasonable restrictive covenants encourages employers to invest in their employees, and invest in their businesses by the creation of valuable confidential information, customer relationships and goodwill. Manhattan Assocs., 2005 WL 2290297, at *20. Enforcement of reasonable restrictive covenants further serves the public interest in enforcing contractual agreements. Id.; Scholastic Funding Group, LLC, 2007 WL 1231795, at *32. When, like here, a party demonstrates both the likelihood of success on the merits and irreparable injury, "it almost always will be the case that the public interest will favor the issuance of an injunction." Marsellis-Warner Corp. v. Rabens, 51 F. Supp. 2d 508, 532-33 (D.N.J. 1999) (citing AT&T v. Winback & Conserve Program, Inc., 42

F.3d 1421, 1427 n.8 (3d Cir. 1994)). Accordingly, granting the relief requested by Flowonix serves the public's interest.

IV. CONCLUSION

For these reasons, Flowonix respectfully requests that the Court enter an order with temporary restraints and enter a preliminary injunction enjoining Defendants from the following: (i) using, disclosing, or otherwise misappropriating any of Flowonix's trade secrets or other confidential or proprietary information; (ii) diverting to any competitor of Flowonix any customer of Flowonix for a period of two years following the entry of judgment against them; (iii) soliciting or encouraging any Flowonix officer, employee or consultant to leave Flowonix for employment with Nuvectra Corporation or any other competitor for a period of two years following the entry of judgment against them; (iv) engaging in any business substantially similar to the business of Flowonix including without limitation working or consulting for, being employed by, or providing services to Nuvectra Corporation or any other competitor for a period of two years following the entry of judgment against them; and (v) to the extent the Court finds any of the restrictive covenants overly broad, to enforce the restrictions to the fullest extent permissible by law.

Respectfully submitted,

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Dated: May 9, 2016

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Plaintiff's Memorandum of Law in Support of Its Application for a Temporary Restraining Order and Order to Show Cause was served this 9th day of May, 2016, via Federal Express and e-mail upon the following:

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